Department of Law Monthly Report

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In This Issue

Collections & Support

100 NEW RESTITUTION CASES OPENED

The restitution caseload continued to increase in July. During July, the unit opened 70 criminal and 30 juvenile restitution cases for collection. Initial notices were sent to 170 recipients. Debtors paid 22 judgments in full, and satisfactions of judgment were filed in those cases. Our office received payments totaling $15,992.07 toward criminal restitution judgments and $7,279.80 toward juvenile restitution judgments in July. We requested 95 disbursement checks and issued 63 checks to recipients. Thirteen payment agreements were set up.

The collections unit also completed a review of all civil collection files. The unit prepared two writs of execution for attachment of permanent fund dividends, closed three penalty and civil collection files, and collected $1,050.00 in civil or penalty cases. On the criminal side, the unit sent 39 letters responding to inquiries from defendants and courts regarding payment agreements and other collection issues. The unit collected $34,114.90 in voluntary payments and requested 26 refunds be issued.

COURT RULES FOR CSED IN TWO PATERNITY CASES

In *State, CSED v. Harrison*, AAG Connie Carson responded to Mr. Harrison's motion for relief from enforcement of child support. Mr. Harrison claimed that he should be relieved of his support obligation because he was not the child's biological father. AAG Carson pointed out that the court had issued a default paternity judgment against Mr. Harrison in December 1996. Although genetic test results confirmed that he was not the biological father, Mr. Harrison did not request relief until September 19, 2001. Therefore, AAG Carson argued that relief from the paternity judgment should be granted prospectively from October 1, 2001, forward, and that Mr. Harrison should remain liable for child support arrears that accrued before October 1, 2001. On July 31, 2002, the superior court granted Ms. Carson's request.

In *State, CSED v. Bradshaw*, AAG Carson requested a hearing on an order to show cause because Mr. Bradshaw failed to comply with an administrative genetic testing order. Mr. Bradshaw filed a motion to dismiss the administrative testing order, arguing that CSED lacked jurisdiction to establish paternity because the child had not been "born out of wedlock." The child had been born to a married woman, but her husband had already been disestablished as the child's father. At the hearing, AAG Carson explained CSED's statutory authority to proceed with paternity establishment and argued that CSED was not precluded from seeking paternity establishment by the mother's prior marriage. The court found that CSED's genetic testing order was valid and that Mr. Bradshaw was obligated to submit to testing. CSED collected his genetic sample in the courtroom at the hearing.

COURT DECLINES TO SANCTION CSED

In *Barta v. Barta*, AAG Jeff Killip successfully defended CSED against a motion for sanctions filed by a child support obligor in an administrative appeal to the superior court. Mr. Barta sought sanctions against CSED for its failure to produce the record on appeal in a timely fashion. In an attempt to accommodate Mr. Barta's concerns, CSED agreed to waive the record preparation fees even before the court ruled on the motion for sanctions. Mr. Killip attempted without success to persuade Mr. Barta's counsel that pursuing the sanctions route would be a distraction of resources for all involved. The superior court found that CSED had acted in good faith, despite its delay, and denied Mr. Barta's request for sanctions.

CHILD SUPPORT ARREARS UPHELD BY COMMISSIONER OF REVENUE

In the *Friday* appeal, AAG Diane Wendlandt obtained a favorable ruling from the Commissioner of Revenue reconsidering a formal hearing decision that improperly extinguished ten years' worth of child support arrears. In 1989, CSED had established an administrative support order by default, requiring Mr. Friday to pay support for his daughter, Amber, who was receiving public assistance. By 1991, the child was no longer receiving public assistance and CSED had lost contact with the mother. CSED continued to collect the state debt, but stopped collecting the support owed to the mother. When the state debt was paid, CSED closed its case. In May 2000, Amber's mother again applied for public assistance. CSED reopened the case and added back all of the arrears that had accrued under the order from 1991 through May 2000.

Mr. Friday then asked CSED to review the default order and replace it with an order based on his actual income. CSED granted his request and issued a new support order for the entire time period (back to 1989). Mr. Friday appealed. The formal hearing examiner affirmed the new support amount from May 2000 forward, but held that, as a matter of law, CSED could not collect support for 1991 to May 2000, the period when CSED had lost contact with the mother.

We filed a motion for reconsideration. The Commissioner granted the motion, finding that a support order does not terminate merely because CSED is not enforcing the order. When a custodial parent withdraws from CSED's services, support continues to accrue, and CSED must collect those arrears if the custodial parent later reapplies for services.

Commercial Section

COURT UPHOLDS DENIAL OF PFD DUE TO INCARCERATION ON FELONY

The superior court upheld a denial, by the Department of Revenue, of Mr. Fox's application for a 1999 permanent fund dividend. The department rejected his application because he had been incarcerated during 1998, the PFD qualifying year, for a violating the terms of his felony probation. By law anyone incarcerated during the qualifying year may not receive a permanent fund dividend if the incarceration was the result of a felony conviction. Mr. Fox asked the court to find that he qualified for the PFD because he had been incarcerated in 1998 as the result of a violation of probation and not as the result of his 1992 felony conviction. He also argued that the time he spent in jail in 1998 does not count as being incarcerated as the result of a felony conviction because he wasn't adjudicated for violating his probation until the following year. The court rejected both arguments. AAG Dan Branch represented the department in the action.

COURT GRANTS MOTION FOR SUMMARY JUDGMENT IN LAWSUIT CHALLENGING STATE REAL ESTATE LAWS

Superior Court Judge Sharon Gleason granted the state's motion for summary judgment in *Discount Buyers' Realty, et al. v. State of Alaska*. The suit was brought by an Anchorage attorney and real estate licensee to challenge the constitutionality of the new statutory restrictions on fee splitting or rebates. The restrictions prohibit a real estate licensee from splitting, or rebating, a portion of the fee obtained as a result of a real estate transaction with a person not licensed as a real estate agent. The plaintiff argued that the restrictions violated his right to substantive due process, equal protection, and privacy. Judge Gleason found that the statute was constitutional. AAG Gayle Horetski represented the state in this case.

ALASKA COMMISSION ON POSTSECONDARY EDUCATION

Shirley Mae Staten vs. ACPE & PFD Division

Shirley May Staten received 5 student loans from ACPE in the 1980s. These loans went into default and ACPE administratively seized her PFDs in 1992, 1994 and 1995. She failed to apply for her PFDs for 1996-1998 because she thought ACPE would be applying for her and then using her PFDs to repay her student loans. In 1999 or 2000 she learned that this was not the case and she then applied for those years' PFDs. The PFD Division denied her application arguing that she failed to timely apply. She then sued the PFD Division and ACPE to have her 1996-1998 PFDs applied to her loans. The PFD Division successfully moved to have the matter converted to a 601 appeal of an administrative agency decision. At a recent status conference Judge Rindner agreed that the claim against ACPE should be considered first. If the court rules in favor of ACPE then her claims against the PFD Division are more or less moot. Meanwhile, ACPE made a settlement offer to Ms. Staten that she has accepted. She has agreed to pay 8 PFDs to ACPE in satisfaction of the entire debt. In return she will dismiss her action with prejudice. AAG Mary Ellen Beardsley represented ACPE in the matter.

ABC BOARD FILES ACCUSATION AGAINST ANCHORAGE BILLIARD PALACE

AAG Linda Kesterson assisted the staff of the Alcoholic Beverage Contol (ABC) Board in filing an accusation against the Anchorage Billiard Palace for allowing illegal gambling on the licensed premises. The gambling consisted of Calcutta type betting pools in conjunction with pool tournaments.

DIVISION OF INVESTMENTS

In 1990, Alexander Stuart applied for a fishing loan from the Division of Investments (ADI) secured by a vessel and fishing permit. The loan was also guaranteed by Stuart's father and by a business partner, Larry W. Jackson. The loan is now in default and there is currently due and owing in excess of $128,000. Unfortunately, ADI is seriously undersecured considering the value of the fishing permit has declined substantially and ADI is in a second-lien position on the vessel. ADI has filed a complaint against Stuart and Jackson (the father has filed bankruptcy) to collect the amount due and owing. Jackson has filed an answer claiming that his signature to the last modification to the note was forged. He is claiming that ADI's acceptance of the forged document prevents ADI from collecting from him. Stuart has failed to answer and an application for entry of default is being filed with the court. AAG Mary Ellen Beardsley represents the Division of Investments.

Governmental Affairs

STATE PREVAILS IN "FRANK INITIATIVE COMMISSION" LAWSUIT

On July 23, Judge Morgan Christen issued a decision denying the plaintiff's request for injunctive and declaratory relief in a lawsuit brought by the sponsors of the pending initiative to move the legislative session, 01CHGE. The plaintiff "Alaskans for Efficient Government" initially requested that the Governor immediately create the "FRANK Commission"; it later changed its request for relief to a request that the court declare that the Governor should have created the "FRANK Commission" to determine the costs of the session move proposed by 01 CHGE. The state opposed the plaintiff's request on a number of grounds.

Judge Christen adopted the state's reasoning, and found that it would be premature to appoint the FRANK Commission at this time as there was no law in effect to move the legislative session. The initiative proposing to move the session will appear on the November 5, 2002, general election ballot. If the voters vote to enact 01 CHGE, then those parts of the earlier "FRANK Initiative" requiring appointment of a commission to determine costs, and a vote of the people to approve all bondable costs will be repealed.

Judge Christen rejected the plaintiff's arguments that the prior FRANK Initiative required the Governor to appoint the FRANK Commission to determine costs of a session move proposed by a pending initiative, which had not yet been enacted by the voters. The judge agreed with the state's argument that the FRANK Initiative did not intend for the commission to be appointed until after a law moving the session was in effect, and that it would be a waste of state resources to appoint a commission based upon the speculation that an initiative might be enacted by the voters. Judge Christen found that the provisions of the constitution on use of the initiative did not prohibit a two-part process in which the people voted first on the question of the move, and second on the question of the costs of the move.

The plaintiffs may file an appeal of the superior court decision, so stay tuned.

COURT AWARDS ATTORNEY'S FEES TO END LONG-LASTING EMPLOYMENT SUITS

Superior Court Judge Morgan Christen awarded the state more than $10,000 in attorney's fees against a former cook at the Spring Creek Correctional Center. The Department of Corrections terminated the cook's employment in May 1998. Although an arbitrator upheld the termination, the former cook sued the state and individual defendants in state court and, later, federal court. He claimed that the state had discriminated against him and had wrongfully terminated his employment.

The superior court granted summary judgment to the state and the other defendant. The Alaska Supreme Court upheld the summary judgment on appeal, but remanded to the superior court an issue regarding the award of attorney's fees to the state. Based on the state-court judgment, the federal court also granted summary judgment. The Ninth Circuit affirmed that decision. Now that Judge Christen has resolved the remanded attorney-fees issue, the lawsuits flowing from the cook's discharge more than four years ago should be over.

Human Services

FAIRBANKS OFFICE HAS BUSY TRIAL SCHEDULE

AAG Alicia Porter is handling a case in which one of the parents challenged the state's introduction of a school psychologist who worked with a child and had daily non-directed play therapy sessions with the child. During those sessions, the child disclosed sexual abuse and then promptly recanted. The parent's attorney moved to strike the testimony of the school psychologist, as she was not an expert in play therapy under the standard applied in *Daubert v. Merrill Down Pharmaceuticals*, and that play therapy was not a valid researched scientific method to gauge whether or not the child had in fact been sexually abused. The evidentiary hearing was set for July 22, 2002, in Galena. Alicia reports that the state lost on the specific issue as to whether play therapy was a valid scientific tool for assessment of sexual abuse. The trial will be scheduled at a later date, awaiting certain witness testimony.

AAG Karla Taylor-Welch completed a six-day termination trial in which the parental rights of both parents were terminated. All parties agreed, however, to mediate possible visitation of the biological parents at the discretion of the foster parents who wish to adopt the four children.

Karla Taylor-Welch also had another termination trial scheduled in the month of July which resulted in the parental rights being terminated based on an Offer of Proof.

R. Poke Haffner concluded three hotly contested temporary custody hearings during July. The state prevailed in all three cases.

DEFEATED DENTIST

AAG Gary Gantz prevailed in a case he handled for the Department of Health and Social Services. A Homer dentist failed to repay his student loans causing the federal government to disqualify him from serving Medicare patients. The dentist sued the State Medicare program, contending that the state failed to take appropriate steps to secure a waiver on his behalf from the federal government. The court granted the state summary judgment on various duty and immunity grounds.

Legislation/Regulations

NEW REGULATIONS MANUAL DISTRIBUTED

During the month of July, the Legislation and Regulations Section distributed the 15th edition of the Drafting Manual for Administrative Regulations. Additional copies can be obtained by contacting the section.

Additionally, the section completed legal reviews on regulations projects concerning viatical settlement contracts and transactions (Department of Community and Economic Development, Division of Insurance), licensure and investigations of the Board of Pharmacy, student counts for school funding, special education procedural matters, advanced certification, and other educational matters (State Board of Education and Early Development), fish and game (Board of Fisheries and Game), emergency medical services and Medicaid rates for small facilities (Department of Health and Social Services), updating air quality federal standards (Department of Environmental Conservation), and examinations, licensure, ethics, and approved supervision for the Board of Marital and Family Therapy.

Finally, section supervisor AAG Deborah Behr attended the annual meeting of the National Conference of Commissioners on Uniform State Laws. The Uniform Law Commissioners debated numerous important pieces of legislation, especially in the commercial law area.

Natural Resources

NINTH CIRCUIT RULES IN RED DOG APPEAL ON AIR QUALITY PERMIT

On July 30, 2002, the Ninth Circuit Court of Appeals ruled in favor of the EPA in an appeal by the Alaska Department of Environmental Conservation from an EPA order invalidating an air quality permit issued by ADEC to Cominco, operator of the Red Dog Mine. The dispute between ADEC and EPA is over what technology Cominco must install to control emissions of nitrogen oxides from a new diesel generator. ADEC's permit required that Cominco install "low NOx controls" on all seven generators, but EPA in its order said the permit was invalid because ADEC didn't require a more effective technology on two engines. Ironically, total NOx emissions would be less under ADEC's permit. We plan to petition to the U.S. Supreme Court for a writ of certiorari.

FEDERAL SUBSISTENCE BOARD RESCINDS ACTION

On July 11, 2002, the Federal Subsistence Board acted on the State's Request for Reconsideration (RFR) of an action which restricted sport fishers in the Kuskokwim River to the three day a week subsistence schedule. Although the RFR was possibly moot because of the relaxation of the subsistence schedule due to a commercial fishery opening, the board chose not to consider the matter moot and voted 4-2 to rescind their previous action. The state's arguments were (1) that the Federal Subsistence Board violated ANILCA and its implementing regulations by unnecessarily restricting non-subsistence uses; (2) that the board did not follow its own regulations and acted arbitrarily and capriciously when it restricted sport fishing; and (3) that the board did not have authority to take action restricting

non-subsistence uses without a valid conservation concern.

COOK INLET FISHING REGULATIONS WITHSTAND CHALLENGE

Two commercial fishing associations, Kenai Peninsula Fisherman's Association and United Cook Inlet Drift Association, filed suit against the state challenging the validity of several regulations adopted by the Board of Fisheries in February 2002. The plaintiffs claimed that the Kasilof River escapement goal regulation and the regulations that authorized limited emergency order openings by the commissioner as part of a comprehensive management plan for sockeye salmon and other species in Cook Inlet were invalid because they infringed on the Commissioner's authority to respond to in-season fishery conditions.

The plaintiffs' motion for a temporary restraining order was opposed by AAG's Lance Nelson and John Goltz. After a 3 ½ hour evidentiary hearing and oral argument, Judge Harold Brown of the Kenai Superior Court denied the motion, finding that plaintiffs had not demonstrated irreparable harm and that all but one of their arguments did not even raise serious and substantial issues. This was the third consecutive successful defense of a Board of Fisheries regulation against motions for preliminary relief filed this summer.

STATE APPEALS EASEMENT TERMINATION

On July 10, 2002, AAG John Baker filed the state's brief in Appeal of the State of Alaska, IBLA No. 2002-197, a challenge to the decision by the Bureau of Land Management to terminate a public trail easement near Unalaska reserved for many years under Section 17(b) of ANCSA. BLM had attempted to terminate the easement in 1998 based on the agency's own failure to reserve a site easement at the trail's terminus. Unable to defend that decision, BLM agreed to a remand. In 1999 BLM issued a new decision reinstating the easement, but vacated that decision after only two weeks. Now, two years later, BLM has come up with a new theory: that the easement was improperly described all these years, and in fact never existed in the first place. BLM and Ounalashka Corporation, the underlying landowner, have requested an extension until October 31, 2002, to file answers to our brief.

Oil, Gas & Mining

In addition to working on oil and gas cases, AAG Lisa Kirsch is the executive branch ethics attorney for the state. In July she advised a number of agencies of various ethics issues, and gave a presentation to Department of Transportation and Public Facilities on ethics issues that arise in that department.

All of the AAGs in the Juneau section spent time in July working on one or more corporate income tax cases. Other pending cases for which the section provided advice and assistance during July include protests over the Northstar Pipeline tariffs and ongoing audit issues with Alyeska and the owners of the Trans Alaska Pipeline System.

STATE ENTERS INTO OIL ROYALTY SETTLEMENT AGREEMENT WITH PHILLIPS ALASKA, INC., AND NEGOTIATES MODIFICATIONS TO BP ROYALTY SETTLEMENT AGREEMENT

The State of Alaska, Department of Natural Resources (DNR) recently entered into an oil royalty settlement agreement with Phillips Alaska, Inc. Phillips and other companies that produce oil on state lands must pay royalties to the state under lease agreements, based on the value of the oil on the North Slope. To determine this royalty value, the transportation costs of sending the oil down the Trans-Alaska

pipeline (TAPS), and then on tankers from Valdez to the West Coast, must be deducted from the West Coast sales price. Under the terms of the agreement, Phillips will pay the state approximately $6 million to resolve additional past royalties due from Phillips' North Slope production on state-leased lands. The agreement also provides a formula for determining the method for calculating future royalties. The royalty negotiations between DNR and Phillips were especially concerned with transportation costs relating to Phillips' new "Millennium-class" double-hulled tankers, as well as the appropriate sales value of the oil and other issues. If the parties had not reached settlement, an arbitration to resolve disputed issues was scheduled to begin in September.

Also, DNR negotiated modifications to the destination value formula in the BP Royalty Settlement Agreement. DNR succeeded in getting BP to accept spot price as the destination value for ANS.

AAGs Richard Todd, Larry Ostrovsky, and Martin Schultz represented DNR in these matters.

Special Litigation

BOARD ORDERS EVALUATION BY INDEPENDENT MEDICAL EXPERT AFTER FINDING CLAIMANT'S TESTIMONY WAS NOT CREDIBLE

A former state employee initially testified that, while he had a congenital condition affecting his legs, he sustained a traumatic left leg injury during a slip and fall at work. He later told examining physicians his work required prolonged standing and frequent heavy snow shoveling that had worsened his condition. Based upon those descriptions the physicians testified the work duties had caused the congenital condition to worsen. The former employee then claimed additional workers' compensation benefits for permanent total disability.

At the resulting hearing the state, represented by AAG Paul Lisankie, challenged the former employee's credibility. Its defenses included evidence that relatively little snow had fallen during the period in question and prolonged standing was not required. Instead, the employee's duties had been sporadic in nature and most could have been performed while seated. The work and office configuration also allowed opportunities to sit with legs raised in a manner the physicians agreed would have alleviated the condition.

In its July 25, 2002, Decision and Order the Alaska Workers' Compensation Board found the state's evidence consistent and credible and the former employee's testimony concerning his alleged work duties patently incredible. The board found the nature of the work was consistent with the state's evidence. Because the examining physicians had relied upon the former employee's descriptions, and the medical questions involved in the claim were complex, the board ordered an evaluation by its own independent medical expert. The board directed its expert to rely solely upon the findings it made concerning the nature of the work.

Transportation

RELOCATION BENEFITS HEARING

When a person's land is condemned and they must move, they may receive the value of their real property in a condemnation proceeding and, under a separate statutory scheme, may also receive relocation benefits. Relocation benefits compensate for some items not available in condemnation, such as certain personal property losses related to moving. In

a condemnation proceeding, DOT&PF paid the owner of a greenhouse on the Parks Highway the value of their real property. Under the separate relocation program, DOT&PF paid $113,796 to compensate the owner of the greenhouse for nursery stock that could not be moved. DOT&PF only provided relocation benefits for trees and shrubs that appeared to be nursery stock. DOT&PF did not provide relocation benefits for trees and shrubs that appeared to be landscaping because landscaping is ordinarily considered to be part of the real property and is thus valued in the context of the entire parcel. The owner of the greenhouse contended DOT&PF owed him an additional $74,684 under the relocation program for the landscaping. The owner contended that a greenhouse's landscaping is not real property to be valued in the context of an entire parcel, but rather personal property that can be sold in the course of business. The owner contended that as personal property the landscaping trees and shrubs should be individually valued. After a day long hearing, DOT&PF's Relocation Appeals Board rejected the owner's argument, determining the trees and shrubs at issue were part of the realty. AAG Susan Urig represented DOT&PF's relocation staff.

ILIAMNA-NONDALTON ROAD CHALLENGED

DOT&PF has again been sued over plans to construct a road from Iliamna to Nondalton in Southwest Alaska. DOT&PF's plans were first challenged in 1997, resulting in additional environmental studies. Two of the same plaintiffs, Robert Gillam and the Alaska Council of Trout Unlimited now claim a violation of state law for allegedly scheduling construction of the road without annually developing a comprehensive, intermodel, long-range transportation plan including all projects scheduled for construction during the following two years. The complaint also asserts DOT&PF's project evaluation criteria and scoring policies are defective because they have not been adopted as regulations. AAG Susan Urig is representing DOT&PF.

BID PROTEST SUCCEEDS

AAG Tom Dillon assisted DOT&PF on a bid protest. The apparent second low bidder asserted that the apparent low bidder was not qualified to assert an Alaska Bidder preference. Absent the preference, the apparent second low bidder would actually be the lowest bidder. The apparent low bidder claimed a residence as its Alaska place of business. Investigation revealed that the person occupying the residence was not an employee of the apparent low bidder, and performed no business function other than receiving and forwarding facsimile transmissions to the apparent low bidder in Washington. DOT&PF concluded the apparent low bidder was not qualified to assert an Alaska Bidder preference, and sustained the protest.

KENAI COURTHOUSE PURCHASE

AAG Tom Dillon assisted the Alaska Court System in exercising an option to purchase the Kenai Courthouse from the City of Kenai.

COURT RULES FOR DOT&PF IN TIEDOWN DISPUTE

DOT&PF adopted regulations in 2001 designed to allocate the limited number of float plane slips at Lake Hood to pilots who regularly use the slips. Subsequently, DOT&PF refused to renew a Lake Hood tie-down permit because the permittee had not kept an aircraft in the slip the requisite number of days and had not operated it the requisite number of days. The former permittee appealed DOT&PF's decision to superior court and moved for to stay DOT&PF's decision so that he could continue to use the slip until the court could rule on the merits of the case. The superior court denied the stay, finding the pilot did not face irreparable harm and that the pilot would probably not succeed on the merits. AAG Gary Gantz represented DOT&PF.

NO WAIVER OF 11TH AMENDMENT SOVEREIGN IMMUNITY

The state obtained a permit from the U.S. Corps of Engineers to fill wetlands at the Ted Stevens Anchorage International Airport. Environmental groups sued the Corps in federal court, claiming the Corps' issuance of a permit violated the Clean Water Act, National Environmental Policy Act, and Clean Air Act. The state moved to intervene.

Initially, the court granted the state's intervention and the state filed a brief opposing plaintiffs' motion for summary judgment. The U.S. Supreme Court subsequently issued a decision concerning the scope of a state's 11th Amendment sovereign immunity. Citing this case, plaintiffs moved for reconsideration of the state's motion to intervene, arguing the state must either withdraw as an intervenor or waive its sovereign immunity. Waiving immunity, could allow plaintiffs to assert claims against the state in federal court that must otherwise be brought in state court. The federal district court accepted the state's argument that the plaintiffs had only asserted a cause of action against the Corps, and thus no sovereign immunity questions were ripe. Additional causes of action must be individually evaluated for sovereign immunity issues when, and if, they are filed.

Cross-motions for summary judgment have now been fully briefed before the district court, as well as in a parallel state court case challenging a decision by the Alaska Division of Governmental Coordination that the issuance of the Corps permit would not violate the state's coastal zone management program.

Criminal Division

ANCHORAGE

A man was indicted by a grand jury for murder in the first and second degrees for murdering his girlfriend, because she "looked at him" and "made him feel like a piece of shit", he strangled her. His bail remains at $150,000 cash only and TPC. Trial is scheduled for October.

In two other cases, it appears that the tough new laws on drunk driving have not done much to stop DWI homicides. In one case, a man on felony probation was charged with manslaughter, assault in the first degree, failure to render assistance, tampering with evidence, and DWI, as a result of colliding with another vehicle and fleeing the scene, leaving one person dead and another seriously injured. Bail is set at $50,000 cash.

In another case, a woman was charged with manslaughter and driving while license suspended as a result of running a red light and striking another vehicle, killing one person and injuring three others. Additional charges may be filed, once the extent of injuries is determined. Bail was set at $100,000.

BARROW

The Barrow grand jury returned indictments against five defendants on all counts this month. Charges include assault I first degree, assault, assault third degree, felony eluding, felony DUI, and MICS III.

BETHEL

Michael David, Jr., was sentenced to 31 years with 10 years suspended and 10 years probation after being convicted of sexual assault first degree, burglary second degree,

escape second degree, assault fourth degree, and violating conditions of release.

There were five trials held in July. Two bootlegging jury trials had opposite results. Michael David, Sr., was found guilty of sale of liquor without a license, but Nalon Evan was found not guilty of the same offense. Martin Charles was found guilty of DWI after a jury trial. Benjamin Kuntz was found guilty of making a false statement (violation) after a court trial. William Smart was found not guilty of DWI and reckless driving after a jury trial in Hooper Bay.

Sixteen people were indicted during the month of July: two for felony bootlegging, five for felony assault, seven for sexual assault, one for vehicle theft, and one for felony escape.

FAIRBANKS

The first batch of people charged after July 1 with drunk driving plead out, despite stiffer penalties, but the rate of pleas has slowed since then. Misdemeanor attorneys successfully obtained convictions in several .08 trials this month, which we hope will deter the defense bar from taking them all to trial.

Kenneth Rarick, a repeat serial sex offender, was sentenced to 51 years with 19 suspended for sexually abusing four children. He was the former home school teacher of three of the children and encountered the other boy at a North Pole church, where he was the live-in handyman. His sentence was significantly enhanced by testimony from a number of his prior victims, now adults.

Adam Williams, who stabbed his former wife to death one day after the court granted her a divorce, plead no contest to first degree murder, with sentencing set for October. He had convinced her to come by his house to pick up some baby items that were awarded to her in the divorce, then stabbed her over 50 times in the garage, while the children were inside the home.

Oliver Lemon, who was convicted of manslaughter in the beating death of his domestic partner, received a 20-year prison term.

Kimo Petitt, who stuffed toilet paper into the nose and throat of his seven-month-old child to stop it from crying, was sentenced to ten years, with six suspended for that assault.

What first appeared to be an accidental shooting was eventually determined to be intentional, and the grand jury indicted Ernest Elizardo for first degree murder after he shot a 16-year-old family friend in his home. She reportedly had just told him to quit fooling around with his guns while he was drinking.

A Fairbanks police officer was found to have been justified in a shooting death, when a man who had tried to run his passenger's girlfriend off the road then aimed his car at the officer after he was pulled over.

ADA Corinne Vorenkamp returned to the Fairbanks office after a year and half in Sitka.

KENAI

A Homer jury found pro se defendant Walter Gauthier guilty of criminal mischief and a weapons offense, and not guilty of assault and animal cruelty, after he shot a dog from across a street with a shotgun. At trial the defendant disputed the dog owner's testimony that the dog was shot while standing a few feet away from its owner. The defendant claimed that while inside his house he saw the dog in his yard, retrieved a shotgun, and hunted the dog and then shot in self defense.

A man was indicted on several felony charges for selling cocaine in Seward. He was arrested and charged after investigators were able to monitor him during a sale of cocaine to an informant. Additional cocaine, scales, and other items were later found in the defendant's residence.

Several individuals were charged with offenses stemming from a three-day "Mardi Gras" party that got out of hand in Seward over the Fourth of July weekend. Troopers responded to numerous complaints about the party, and charges were filed, including DUI, disorderly conduct, minor consuming alcohol, and misconduct involving controlled substances. The party became so out of hand that during one trooper response unidentified party-goers began throwing rocks at the troopers.

If the first month of felony DUI's with the new seizure laws is an indication of trends, the Kenai office will have a lot of cases with vehicles owned by someone other than the defendant. In July, the Kenai office had a case in which the vehicle was stolen, another in which the defendant was housesitting and "borrowed" the truck without the permission or knowledge of the owner, and yet another in which the owner of the vehicle left his truck for the defendant after they had visited a local tavern together. In the housesitting case, the owner was working on a vessel in Hawaii doing biological research and was very difficult to contact. There were also a couple of cases in which the defendant did own the vehicle.

KETCHIKAN

As in the last several months, the July grand jury was busy dealing with felonies. Four different men were indicted for felony DUIs in July. Two different men were indicted for felony failure to appear. Two women were indicted for misconduct involving controlled substance in the fourth degree. A man was indicted for assault in the second degree.

Other interesting indictments included the following:

A Ketchikan man was indicted for sexual assault in the first degree. He went to his ex-girlfriend's apartment and when she told him to leave, he beat her up and forced her to engage in sexual relations with him. Her friend, concerned because she was aware that the ex-boyfriend was there, went to the apartment and saw part of what happened through an opening in the door. The friend called the police and the woman was taken to the hospital. Even at grand jury, the victim still had many clearly visible bruises and could barely walk from the beating.

A Ketchikan man gave alcohol and marijuana to several minors, and when one of them passed out, he engaged in sexual intercourse with her. He has been indicted for sexual assault in the first degree and several charges of misconduct involving controlled substance in the third degree, furnishing alcohol to minors, and contributing.

A Wrangell man decided to scare his ex-wife by lurching his truck a few feet towards her, but unfortunately he misjudged how far away she was. As she and a young friend were walking in front of his truck, he raced the truck engine and put it into gear. The truck lurched forward and hit the ex-wife, causing a minor injury. He was indicted for three counts of assault in the third degree for injuring his ex-wife and for scaring her and her friend.

Another Wrangell man decided to flee when police tried to stop him for a traffic violation. He raced down the street in his truck and ran over the sidewalk. He then slowed down and jumped out of the truck, leaving it still rolling forward, but luckily the passenger inside the truck was able to stop it before it hit anything. The man was caught, handcuffed behind his back, and placed in a police car while the police officer checked out the truck. While the police officer was away, the suspect was able to get his handcuffed arms from behind his back and escape from the patrol car. He was re-captured the next day after having sawed the handcuffs in half. He was indicted for reckless driving, failure to stop at the direction of a peace officer in the first degree, escape in the second degree, and theft.

KODIAK

A 24-year old commercial fisherman from Oregon got a bit upset when he was ejected from a local bar after having thrown a bar stool across the pool table. Not content with leaving well-enough alone, the gentleman returned to his boat to retrieve his trusty two-foot axe. Fortunately a police officer was able to thwart his re-entry into the bar after having received a silent alarm from a local cab driver and observing the man approaching the side entrance to the bar carrying the axe. Fearing for the continuing safety of the previously battered bar stool, the officer disarmed and detained this gentleman, who would only identify himself as John Doe. The man was subsequently indicted for assault in the third degree and has a pending October trial date.

After having received her mother's permission, a 27-year old Larsen Bay man engaged in a year-long sexual relationship with a 15-year old girl from the village. Following his indictment, and enlightenment to the fact that parental consent is not a defense to sexual assault of a minor, the man pled guilty to sexual assault of a minor in the third degree and was sentenced to 18 months in jail with 15 months suspended and placed on probation for five years.

KOTZEBUE

A Kotzebue man was indicted by a grand jury for misconduct involving a controlled substance in the fourth degree, after receiving a half-pound of marijuana by express mail. A search of his home revealed another 22 grams of marijuana packaged for sale as well as a handgun inside a safe. Members of the Kotzebue police department, Alaska State Troopers, and the U.S. Postal Service participated in the investigation.

After a week-long jury trial, Chae Yuk of Kotzebue was found guilty of three counts of assault in the fourth degree involving domestic violence. The victim had recanted, and testimony by the police, hospital staff, and the victim's family played a big part in the conviction.

After another week-long trial, a Kotzebue jury also convicted Lory Larkin of sexual abuse of a minor in the second degree. Larkin had sexual intercourse with a 13-year-old female, and he was one of three defendants that have been convicted of sex crimes involving the same victim. Larkin, during his defense, testified that he had had sex with a separate underage girl. The troopers have been asked to investigate that case as well.

NOME

A Nome man was indicted for attempted sexual assault and burglary for an incident that occurred on his 18th birthday. The female host of a party passed out and two of the other guests put her in bed and got everyone out of the house. However, the defendant came back. Fortunately, a neighbor heard the subsequent struggle going on and came to the rescue, holding the defendant until the police arrived.

The region's first felony DUI, under the new vehicle forfeiture law occurred in Unalakleet early in the morning on July 1. The forfeiture aspects of the case exemplify the problems in applying the law in rural Alaska; the vehicle is a 10-year-old four-wheeler, the ownership uncertain, there is no impound facility, etc. A second felony DUI occurred in Unalakleet a couple weeks later, but this time the four-wheeler was clearly stolen, so no forfeiture problem is presented.

Two trials during the month resulted in acquittals - a sexual assault case and a contributing case.

A homebrew manufacturing case is wending its way through an entertaining series of motions. The village police seized a partially full five-gallon bucket of homebrew and arrested one of the three people suspected of having made it. During the night, the intoxicated arrestee

became violent and one of the VPO's pepper-sprayed him. The pepper spray had the desired effect, but the prisoner then had to be washed off. The village jail in St. Michael does not have water, so one of the VPO's grabbed the nearest suitable object, the homebrew bucket, dumped its contents, and went to get water to clean up the prisoner. So, we're dealing with an issue of failure to preserve evidence.

PALMER

Danny Wood was sentenced to nine years with five and one-half suspended after a jury convicted him of burglary in the first degree, coercion, assault in the fourth degree, and violating a domestic violence restraining order. Wood entered his estranged wife's house through a window, held her hostage for a period of time, assaulted her, threatened to kill her, and forced her into his car and drove her around the Mat-Su Valley. The court found the burglary aggravated because it was domestic in nature.

Eric Connick was sentenced to ten years with five suspended for a drunk driving manslaughter on the Parks Highway. Connick's blood alcohol level was .286.

An evidentiary hearing in a marijuana grow case resulted in a ruling by Judge Cutler that police cannot enter a driveway unless they intend to contact occupants of the residence. The court stated the police must stop at the point closest to the front entrance and any movement beyond that point, even to turn around, constitutes an illegal search.

OSPA
(Office of Special Prosecutions & Appeals)

Prosecution News

William Goldberg, a former Anchorage police officer, pleaded no contest to a charge of attempted first-degree witness tampering. Goldberg attempted to get a witness to alter her story in a sexual abuse investigation against Goldberg while he was on the police force. Judge Wanamaker found Goldberg's conduct to be a significant breach of the public trust and sentenced Goldberg to a jail term of one year with six months suspended and probation for five years.

Petitions & Briefs of Interest

Briefs of Interest

Standard of care for juveniles engaged in inherently dangerous activities. In an appeal from a juvenile adjudication, the state argues that a teenager who teaches another to load and use a shotgun, so that a second teen could use it to murder persons at the local high school, has engaged in a particularly dangerous and adult activity similar to hunting or driving. The state asserts that with respect to the jury instructions on the culpable mental state of "recklessly," the teenager was properly held to the standard of care for a reasonable adult, rather than a reduced standard of care for a juvenile. *In Re J.R.*, A-7682.

Presence of police officers in courtroom. The state argues that the presence of police officers in the courtroom during defendant's trial for murder of an Alaska State Trooper was not inherently prejudicial because of immediate remedial action taken by both the trial judge and prosecution. The trial judge properly exercised his discretion to limit the number of uniformed officers attending the trial at any one time and the jury was properly instructed to decide the case solely on the evidence presented. *Phillips v. State*, A-7428.

Introduction of slain trooper's widow. The state argues that the introduction of the widow of a murdered Alaska State Trooper did not deprive the defendant of a fair trial. The widow

was a witness at trial (on-duty dispatcher for Glennallen post on the night of her husband's murder). The jury also was instructed to decide the case solely on evidence presented, and the widow's introduction was balanced by introduction of members of the defendant's family by defense counsel. *Phillips v. State*, A-7428.

Statute and Rule Interpretations

Temporary release of convicted prisoners is not permitted under Criminal Rule 35(b) sentence modification. The Alaska Court of Appeals held that Criminal Rule 35(b), which allows a judge to modify a previously imposed sentence, is not be used to respond to defendants' ad hoc needs to be released from prison for temporary periods. *State v. Felix, et al.*, Op. No. 1808 (Alaska App., July 12, 2002).

Second-degree criminal trespass. The Alaska Court of Appeals held that the second-degree criminal trespass statute, AS 11.46.330, extends to circumstances where a defendant promptly leaves the premises after being told to and then returns a short time later, even though the person had technically "left" the premises. *Hammock v. State*, Op. No. 1810 (Alaska App., July 12, 2002).

Possession of a pound or more of marijuana. The Alaska Court of Appeals held that in a prosecution for possession of a pound or more of marijuana under AS 11.71.040(a)(3)(F), the jury need not be instructed that the commonly used form of marijuana is marijuana "bud." *Maness v. State*, Op. No. 1809 (Alaska App., July 12, 2002).